Supreme Court, U.S.
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No. 01-1659

In The

Supreme Court of the United States

WILLIAM J. DEVINE, THERESA DEVINE,
and JOHN DEVINE,
a minor by and through his parents,
William J. Devine and Terry Devine,

Petitioners,

v.

INDIAN RIVER COUNTY SCHOOL BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

On appeal of the result of a due process hearing conducted pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f), does 20 U.S.C. § 1415(i)(2)(B) permit a federal district court to require the parties to re-offer live testimony and evidence rather than review the record of the administrative hearing?

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RESPONSE TO PETITIONERS' "STATEMENT"

Petitioners' "STATEMENT" inaccurately describes the nature of the proceedings below and evidences a misunderstanding of what the District Court requested of the parties in presenting their cases.

Petitioner John Devine has been diagnosed with autism and is therefore eligible for special education services under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 et seq. John's parents, Petitioners William J. Devine and Theresa Devine, did not agree with Respondent Indian River County School Board's proposed individualized education program (IEP) for the 1992-93 school year because it did not provide for a residential placement for John as the parents had demanded. In September, 1992, the parents requested a due process hearing pursuant to 20 U.S.C. § 1415.

The due process hearing was conducted on April 12-15, 1993. The final order was entered on September 21, 1993. At the end of the 1992-93 school year prior to entry of the final order, Mr. and Mrs. Devine removed John from the Indian River County school district and moved to Massachusetts where they enrolled him in the May Institute beginning with the 1993-94 school year. The May Institute is a residential placement paid for by the state of Massachusetts and the local school district in Massachusetts where the Devines resided. John turned 14 on May 10, 1993.

The hearing officer denied the parents' request for the residential placement, ruling that it was not necessary to provide John with an appropriate education. The hearing officer ruled that the 1992-93 IEP did not provide John with a free appropriate public education because it failed

to coordinate protocols and methods used in school with those used at home; failed to provide transition services from school to post school activities; and failed to accommodate John's entry into puberty.

Pursuant to 20 U.S.C. § 1415 (i)(2) the parents appealed the hearing officer's ruling on the residential placement denial and the School Board appealed the ruling concerning the appropriateness of the IEP. The parents asked for an award of attorney's fees, claiming to be the prevailing party in the due process hearing. They also asked the court for a judgment holding Respondent Indian River County School Board responsible for the residential placement at the May Institute even though the state and local school district in Massachusetts were paying for the placement. The Respondent School Board appealed the hearing officer's ruling that the 1992-93 IEP did not provide a free appropriate public education. Ultimately both appeals were consolidated into one action before the Federal District Court for the Southern District of Florida.

On December 2, 1994, the parties filed a Joint Pretrial Stipulation. On Petitioners' Schedule of Exhibits attached to the Joint Pretrial Stipulation, Petitioners listed exhibits 1 through 112 from the due process hearing and additional exhibits Nos. 113 through 259. The Respondent School Board's Schedule of Exhibits listed exhibits 1 through 40 introduced at the due process hearing and additional exhibits Nos. 41 through 57. Petitioners' witness list included five "trial witnesses from the underlying Administrative Hearing" plus ten new witnesses. Respondent's witness list included five names, three of whom testified at the due process hearing. Petitioners only objected to four exhibits and no objections to the witnesses were made.

The parties estimated that the time for trial would be from three to four days.

The trial began on February 21, 1995, and lasted four days, recessing on February 24, 1995, without concluding. The trial resumed and concluded on October 20 1998. The lengthy delay was primarily the result of Petitioners' interlocutory appeal of the trial court's denial of Petitioners' counsel's motion to withdraw.

Contrary to the assertions of Petitioners, at no place in the record did the district court state "that it would not review and rely on the administrative record," nor did the district court state "that it would require the parties to retry the case by bringing in live witnesses." The district court did express its preference for live testimony instead of reviewing depositions and transcripts. The court expressed a desire to have them read into the record. The entire record of the due process hearing was, in fact, filed with the court by Petitioners on December 8, 1994 and is part of the record.

While the court did state that the lawyers "ought to try this case as if this is the trial," it later explained what it meant. When Petitioners' counsel expressed to the court his understanding that "the court is desirous for us to have all the witnesses live and putting on their testimony before the court," the court gave further clarification. The court instructed the lawyers simply to identify what portions of the depositions or transcripts that they really wanted the court to consider. If there was "fat" in the record, then the lawyers should identify only those portions that needed to be reviewed for the court to "decide the case fairly."

On the morning of the second day of the trial, Mr. Devine and Petitioners' counsel were still confused about how the court wanted to proceed. Petitioners' counsel objected to the procedure that he thought the court was requiring. Counsel complained that he thought he was only going to have to supplement what was introduced in the due process hearing, but now the court was requiring that he put it all on again in addition to the supplemental evidence. The court explained that all it wanted was for the attorneys to eliminate the "fat" in the record so that the court could get to the "meat" of the issues.

Petitioners' counsel stated that in order to do that he "would need to go back through each and every exhibit and present the case in that fashion." The court responded emphatically as follows:

> Untrue. That is folderol that you have to come in here with extraneous, irrelevant or unnecessary material. If you are a good lawyer you can do it. If you do not want to do that, that is another ball game. And that is what I am beginning to detect.

Counsel continued to insist that to do what he thought the court wanted, he would have to bring in "a great number of witnesses that we have not yet listed" to present "the distilled version or [sic] those elements that are important in this case." Counsel then requested that the court allow Mr. Devine to read a statement to the court. The court denied that request and then counsel moved to withdraw as attorney of record. After receiving the *ore tenis* motion to withdraw, the court allowed Mr. Devine to address the court directly and explain his position.

Mr. Devine explained that as he understood it, the court was requiring a new trial where all of the evidence

presented at the due process hearing would have to be presented again to the court. He stated to the court that the court "will hear the testimony of each witness who appeared in the original hearing on both sides." The Court responded by stating "Maybe and maybe not. I can protect myself from repetitive testimony. . . . "

Mr. Devine continued to misunderstand the court's position and stated that he "would like to have the opportunity to re-enter all the exhibits that were presented in the due process hearing along with any new exhibits" and requested a continuance so that he could prepare. The court informed Mr. Devine that he was proceeding in the wrong manner. The court denied counsel's motion to withdraw and then stated the following:

> I suggested the procedure I suggested yesterday because it is the speedy way and efficient way to resolve this matter. What you are proposing is an interminable tunnel without light at the end of it. And I am not doing it that way.

The trial lasted a total of five days, only one day longer than estimated in the Joint Pretrial Stipulation. Although Petitioners listed ten witnesses that they intended to call at the federal court trial (two of whom testified at the due process hearing), they, in fact, only called two witnesses, only one of whom had testified at the due process hearing. Petitioners never introduced any witnesses who testified at the due process hearing for the purpose of giving the same testimony again or introducing the exhibits that were presented in the due process hearing.

The court entered its Final Judgment on July 30, 1999. On the primary issue of the requested residential

placement, the court agreed with the hearing officer that a residential placement was not necessary in order to provide John Devine with a free appropriate public education. The court disagreed with the hearing officer's determination that the 1992-93 IEP failed to provide an appropriate education. In reaching its decision, there is no evidence that the court did not receive and consider the records of the administrative proceedings.

The Civil Docket indicates that the record from the due process hearing was filed by Petitioners on December 8, 1994. Although Petitioners did not comply with the court's suggestion of identifying those portions of the administrative record that the parties really intended to rely upon, there is no evidence that the court refused to consider evidence submitted by Petitioners at the due process hearing.

To the contrary, the court specifically stated that its decision was in part based "upon consideration of the administrative record." The court noted that Petitioners' expert, Dr. Amy Weatherby, testified at the due process hearing and described the essence of some of her testimony at the due process hearing. The court stated that the hearing officer also relied heavily upon the testimony of Petitioners' expert "on the needs of autistic children generally." The court also noted that "the evidence presented at the administrative level and the subsequent hearing fails to support" any claim that the Respondent School Board failed to comply with the procedures set forth in the IDEA.

On appeal to the Eleventh Circuit Court Of Appeals, Petitioners raised the issue that "the trial court erred by requiring that the parties retry the case, and by refusing

to receive the records of the administrative proceeding." The Eleventh Circuit responded to that assertion in a footnote as follows:

> Plaintiffs argue that the district court refused to consider the administrative record and to give the weight to the findings and conclusions of the hearing officer. It, however, was within the district court's discretion to prefer live testimony over that of depositions and, in the event live testimony was not possible, to require the depositions to be read into the record. Plaintiffs' assertion that the district court ignored the administrative record is belied by the court's final order, which extensively referred to the administrative record and specifically cited testimony given by Dr. Amy Weatherby, who did not testify before the district court.

REASONS WHY THE PETITION SHOULD BE DENIED

Certiorari should be denied because the facts and reasons set forth in the Petition as the basis for granting certiorari review simply do not exist. Petitioners are asking this court to grant certiorari of a proceeding that is totally mischaracterized and review purely fictional rulings of the district court described in the Petitioners' STATEMENT beginning on page four.

MISCHARACTERIZED PROCEEDINGS

The Petitioners' STATEMENT characterizes the proceedings at the due process level as Mr. and Mrs.

Devine objecting to the proposed IEP for the 1992-93 school year claiming that it did not provide a free appropriate public education. They claimed that the hearing officer agreed with them by ruling that the proposed IEP was not appropriate. They accurately assert that Respondent sought review of that decision. They also accurately state that they filed an action in the federal district court "seeking damages, fees and costs and *additional eligibility and relief* under the IDEA." (Emphasis added).

What they intentionally omit is that the hearing officer also ruled that the Devines were not entitled to the residential placement for their son that they had demanded from the School Board. The primary thrust of the proceeding always was to get a residential placement for their son. The so-called "*additional eligibility and relief*" requested in their appeal to the district court was specifically for the court to reverse the hearing officer's ruling that the residential placement was not necessary. That the residential placement was the paramount concern of the Petitioners is evident from a reading of the hearing officer's Final Order, the district court's Final Judgment and the decision of the Eleventh Circuit Court of Appeals.

Petitioners also omit the fact that the proceedings were about the IEP for one school year (1992-93) when John Devine turned four[illegible]n years old. He is now 23 years old. They omit the fact that they moved to Massachusetts after the 1992-93 school year and that the State of Massachusetts and the local school district in which they resided paid for the residential placement at the May Institute. They omit the fact that they were requesting that the district court require the Respondent School Board to pay for that residential placement even though it

was already being provided at no cost to the Devines pursuant to the IDEA.

FICTIONAL RULINGS

A. The District Court Refused to Accept, Review, and Give Consideration to the Record of the Due Process Proceedings.

Petitioners are also requesting that this court review fictional rulings of the district court that never occurred. First, the Petitioners claim that the district court refused to accept and review the record of the due process proceedings and give it due consideration. On page five of the Petition they assert that the district court stated "that it would not review and rely on the administrative record." On page 16 of the Petition they claimed that "the court clearly indicated to the parties that it would not accept the administrative record as the basis of the appeal." If that had been the case, the Respondent would have informed the court that under 20 U.S.C. § 1415(i)(2)(B) the court is required to "receive the records of the administrative proceedings."

On page seven of the Petition, Petitioners allege that "it is clear from its instructions to the parties . . . that the court did not read or give any weight to the overwhelming majority of the administrative record." On page 17 they state that "it is clear from the decision that the court ignored most of the record."

The simple fact is that the Petitioners cannot point to any place in the record to support their assertions that the court refused to accept, review, and give consideration to the record of the due process hearing. In fact the record

affirmatively reflects to the contrary. The Civil Docket reflects that the entire record of the due process hearing was filed by the Petitioners on December 8, 1994, before the trial began. The court affirmatively indicated in the Final Judgment that it considered the administrative record in reaching the findings of fact and conclusions of law. Petitioners would have this Court presume that the trial judge misrepresented that fact without any support in the record for such position.

Moreover, the Final Judgment reflects that the court received and reviewed the record from the administrative hearing. For example, Petitioners did not produce Dr. Amy Weatherby to testify live at the district court trial, yet the court cites her testimony from the administrative hearing to the effect that she found that the 1992-93 IEP failed to provide John Devine with a free appropriate public education. The court noted that her conclusion was based "on limited observation of John and without consulting his teachers or requesting the documentation underlying the IEP." The Final Judgment even points out that Dr. Weatherby testified during the administrative proceeding to the effect that a residential placement might only be temporary with the eventual placement being back in the home with proper coordination. The court could not have known that without reviewing the record of the due process hearing.

Finally, Petitioners try to present this case as one where the district court totally ignored the decision and reasoning of the hearing officer in the due process proceedings and substituted its judgment for that of the hearing officer. This, of course, is not the case and ignores the fact that the main thrust of the due process proceedings was to secure a residential placement for John Devine as demanded

by his parents. On the major issue of the residential placement, the district court agreed with the hearing officer's conclusion that residential placement was not necessary. It was only on the minor issue of what services should be in the IEP that the district court disagreed with the hearing officer. Petitioners cannot legitimately claim that the court did not give consideration to the hearing officer's ruling when it accepted the hearing officer's ruling on the most important issue – residential placement.

While there may be a basis for this Court to accept a case for review where an appellate court upholds a district court's ruling that it would not accept, review, and give consideration to the record of the due process hearing, review on such a basis should wait until there is a case where that actually happened. This is certainly not that case.

B. The District Court Required the Parties to Retry the Case.

The Petitioners claim that the district court required the parties to retry the case. On page five of the Petition they claim that "the district court stated that it would require the parties to retry the case by bringing in live witnesses." On page six they claim that the court informed the parties that they "would be required to conduct a full-blown trial in the federal district court." On page seven the Petitioners state that "the parties proceeded with a virtual re-trial of the due process hearing." The Petition on page 17 asserts that "the parties were required to conduct a lengthy and costly trial de novo of the due process hearing." The record simply does not support these allegations.

As pointed out above in the Response to the Petitioners' "STATEMENT," the Petitioners and their counsel were very confused about how the court wanted the parties to proceed in putting on their cases. They thought that the court wanted them to re-enter all the exhibits and bring back all the witnesses to testify. The court was clear that was not what he was suggesting. When Mr. Devine requested a continuance so that he would have enough time to prepare to re-enter everything from the due process hearing, the court responded by stating "What you are proposing is an interminable tunnel without light at the end of it. And I am not doing it that way."

The court did not want a retrial. It wanted the attorneys to identify what portions of the record were extraneous "fat" and what portions of the record were addressing the real issues for the court to review. The court also wanted those portions of the depositions and transcripts that the attorneys wanted the court to consider to be read to the court. The court, however, did not require the attorneys to do so. This is evident by the fact that the petitioners did not produce Dr. Amy Weatherby to testify again nor did they read any of her previous testimony into the record. Yet, the court extensively noted her testimony and its content in the Final Judgment.

The parties did not proceed "with a virtual re-trial of the due process hearing" as claimed by the Petitioners. The Petitioners called only one witness who testified at the due process hearing. That witness testified about new information that came up after the due process hearing and did not reintroduce the previous testimony. Mr. Devine, the only other witness Petitioners called, testified briefly after portions of his depositions were read into the record by Respondent's counsel. He had not testified

previously. Other than filing the record of the due process proceeding with the court on December 8, 1994, Petitioners presented none of the exhibits introduced at the due process proceeding and produced none of the other witnesses from that proceeding.

Likewise, Respondent did not retry the case from the due process hearing. One of Respondent's witnesses did basically reintroduce her testimony given at the due process hearing; however, there was a good reason for that. Her testimony explained a before-and-after videotape of John Devine at school in Indian River County. It would be most difficult, if not impossible, to follow the explanation given by this witness by reading the transcript and following the videotape at the same time. As the witness did at the due process hearing, she testified while showing the video, explaining what was being seen. At times the witness would pause the video and continue the explanation. Thus, it was appropriate to simply repeat her testimony instead of the court trying to discern what she was talking about from the transcript while playing the video.

Again, while it would be appropriate for this Court to accept a case for certiorari review where an appellate court upholds a district court's ruling that required the parties to a due process hearing to retry the entire case, review on such a basis should wait until there is a case where that actually happened. This is certainly not that case.

ADDITIONAL EVIDENCE

The Petition argues that this is a case of interpreting what is appropriate "additional evidence" as contemplated

by 20 USC § 1415 (i)(2)(B). Petitioners cite many cases addressing the issue of what constitutes "additional evidence," pointing out the differences among the circuits. Here again, it may be appropriate to settle the differences among the circuits as to the appropriate interpretation; however, the appropriate time to do so is when there is a case involving that issue. This is not that case.

If this case did involve the district court ruling that all of the evidence, testimonial and documentary, that was introduced at the due process hearing must be reintroduced for the court to consider it, then the issue of "additional evidence" would be present. As noted above, the court was quite clear that it considered Mr. Devine's proposal to re-enter all the exhibits and witnesses to be "an interminable tunnel without light at the end of it." The court stated that it would not allow that to happen.

Other than the Petitioners' misunderstanding that the court was requiring the parties to reintroduce all of the evidence introduced at the due process hearing, the petitioners have cited no other place where the issue of the interpretation of "additional evidence" was preserved for possible review by this Court. Both Petitioners and Respondent noted in the witness and exhibit lists attached to the pretrial stipulation numerous witnesses and documents that they wanted to introduce as "additional evidence" but no rulings on such "additional evidence" were challenged on appeal so as to be a basis for certiorari review.

CONCLUSION

This case should not be accepted for certiorari review because the question presented is unrelated to this case. The question of whether or not a federal district court can require parties to re-offer live testimony and evidence rather than review the record of the administrative hearing under 20 U.S.C. § 1415 (i)(2)(B) is a hypothetical question with respect to this case. Neither the district court nor the court of appeals ruled that it was proper to require that the evidence introduced at the due process hearing be reintroduced before the district court in lieu of accepting for review the administrative hearing record.

Respectfully submitted.

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